

Excerpts from:

**Reply Declaration By National
Economic Research Associates, Inc.
(filed with BellSouth Reply
Comments)**

**BellSouth Reply Comments
(filed July 17, 2002)**

**BellSouth Comments
(filed April 8, 2002)**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local)	CC Docket No. 01-338
Exchange Carriers)	
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications)	CC Docket No. 96-98
Act of 1996)	
)	
Deployment of Wireline Services)	
Offering Advanced Telecommunications)	CC Docket No. 98-147
Capability)	

Reply Declaration

By

National Economic Research Associates, Inc.

On Behalf of

BellSouth Corporation

July 17, 2002

G. Claim: “CMRS Carriers are impaired without the availability of dedicated transport on a UNE basis.”

1. Introduction

170. The Commission seeks comment on whether section 251(d)(2) requires it to take into account the particular “service” that a requesting carrier seeks to offer.¹⁶¹ In particular, the Commission wishes to know whether it would be useful to “conduct unbundling analyses for individual services?”¹⁶² More specifically, the Commission asks whether the level of competition for a particular service should matter for determining the need to unbundle ILEC-offered network elements.¹⁶³ In this context, the Commission invokes the example of CMRS carriers.¹⁶⁴

2. Position of unbundling proponents

171. In response to this inquiry, three CMRS carriers, namely, AT&T Wireless, Nextel, and VoiceStream have filed Initial Comments with the Commission. Their principal arguments and positions may be summarized as follows:

1. CMRS carriers are impaired when ILECs deny them dedicated transport provisioned as a UNE to link their Mobile Switching Centers (“MSCs”) with their base station cell sites.¹⁶⁵
2. CMRS carriers have to rely on ILEC transport provisioned as a tariffed special access service, rather than as a UNE. This compels those carriers to charge higher prices to their end-users and, in the process, causes them to experience competitive harm.¹⁶⁶

¹⁶¹ *NPRM*, ¶37.

¹⁶² *Id.*

¹⁶³ *NPRM*, ¶38.

¹⁶⁴ “[S]hould the particular characteristics of the CMRS market affect the availability of UNEs to CMRS carriers?”
Id.

¹⁶⁵ This is the central contention of the three CMRS carriers. See *Comments of AT&T Wireless Services, Inc.* (“*AT&T Wireless Comments*”), *Comments of Nextel Communications, Inc.* (“*Nextel Comments*”), and *Comments of VoiceStream Wireless Corporation* (“*VoiceStream Comments*”), in this proceeding.

¹⁶⁶ *Nextel Comments*, at 4.

3. ILECs enjoy an effective monopoly in the provision of transport facilities needed by CMRS carriers.¹⁶⁷
4. Ever since the Commission granted pricing flexibility for ILECs' transport services sold as tariffed special access services, ILECs have frequently raised, rather than lowered, their prices.¹⁶⁸
5. The Commission should not make unbundling rules based on the type of service that a requesting carrier (such as a CMRS carrier) intends to provide.¹⁶⁹

3. Reply to unbundling proponents

172. Under the standards of impairment adopted by the Commission and discussed in previous sections, CMRS carriers are not, and cannot be, impaired by the provision of ILEC transport as a special access service, rather than as a UNE. Moreover, as explained by BellSouth, inter-office transmission facilities such as dedicated transport may only be provided as UNEs to link switches or wire centers.¹⁷⁰ Base stations in CMRS networks do not qualify as either switches or wire centers, and links between them and MSCs do not qualify as dedicated transport.
173. Technical or network issues aside, there are strong economic reasons for denying the CMRS carriers' request for unbundled ILEC transport. CMRS carriers cannot claim to be impaired in the face of clear evidence of their success as intermodal competitors. All of the available evidence points only to one conclusion about CMRS carriers, namely, that several years of strong growth and falling end-user prices have enabled the wireless industry to emerge as a viable intermodal competitor to ILECs and other wireline carriers. Judging by that evidence, the prognosis for continued strength and competitive progress by CMRS carriers remains promising. If, as they claim in this proceeding, CMRS carriers were impaired at the wholesale level without access to ILEC transport at UNE prices, then their remarkable success at the retail level simply

¹⁶⁷ *AT&T Wireless Comments*, at 9; *VoiceStream Comments*, at 3.

¹⁶⁸ *AT&T Wireless Comments*, at 12.

¹⁶⁹ *AT&T Wireless Comments*, at 16-19.

¹⁷⁰ *BellSouth Comments*, at 55.

could not have been possible. Significantly, having to obtain the requisite transport from ILECs in the form of special access services has done nothing to constrain either the growth and performance of individual CMRS carriers or of competition among those carriers.

174. The overall health—and improving prospects—of the CMRS segment of the telecommunications industry is best understood by examining data recently released by the Cellular Telecommunications and Internet Association (“CTIA”). These data, summarized in Table 18, demonstrate that CMRS carriers have performed spectacularly on a number of different indicators.

Table 18. Selected Performance Indicators of CMRS Carriers, 1985-2001¹⁷¹

CMRS Performance Indicators	2001	2000	1985	Annual growth rate (2000-2001)	Annual average (exponential) growth rate (1985-2001)
Subscribers (Reported)	109,674,358	103,641,514	203,600	23.1%	28.9%
Subscribers (Estimated)	118,397,734	97,035,925	203,600	22.0%	39.8%
Revenues (\$ Thousands)	58,726,376	45,295,550	666,782*	29.7%	29.9%*
Gross Investment (\$ Thousands)	99,725,965	76,652,358	588,751	30.1%	32.1%
Direct Employment	186,317	159,645	1,697	16.7%	29.4%

* Annual service revenues measured from June 1986 on.

¹⁷¹ Source: CTIA, *Measuring Wireless Today: CTIA's Semi-Annual Survey*, February 28, 2002, available from http://wireless.fcc.gov/services/cmrs/presentations/Bob_Roche_Feb_28_FCC_presentation.pdf. All data measured in June of various years.

In addition, CMRS carriers' total reported billable minutes-of-use grew to nearly 200 billion in June 2001 from less than 10 billion in June 1992 and less than 50 billion as recently as December 1998.¹⁷² This rapid growth spurt in actual billable usage was made possible by steep declines in prices paid by subscribers for various wireless service plans. That, in turn, has been facilitated by dramatic reductions in the cost that CMRS carriers incur to provide service, competition not merely among themselves but also intermodal competition with alternatives like wireline and Internet-based communication, regulatory change, and rapidly increasing consumer acceptance of the mobility, coverage, and flexibility offered by wireless telephony. Major technological advances and cost reductions have enabled CMRS carriers to both improve service quality and diversify their service offerings. For example, according to one source, the four major CMRS carriers (AT&T Wireless, Verizon Wireless, Cingular Wireless, and Sprint PCS) can now all offer service with a least cost per minute price as low as approximately 10¢ per minute.¹⁷³ That, combined with very generous "free-minutes" allowances, flat-rated pricing, no long distance or roaming charges, and nationwide coverage has positioned CMRS carriers to become a strong competitor to traditional wireline service providers like LECs and IXC's. In fact, it appears that after a period of falling average local monthly bills for CMRS subscribers (coinciding with falling prices for wireless service plans), those local monthly bills have actually trended upward in the last two years.¹⁷⁴ This signifies that rising wireless usage has more than offset the decline in prices to produce new gains in revenues per subscriber.¹⁷⁵

¹⁷² *Id.*

¹⁷³ The Strategis Group, http://wireless.fcc.gov/services/cmrs/presentations/Adam_Guy_FCC_CMRS_Forum.pdf, February 28, 2002.

¹⁷⁴ CTIA, *Measuring Wireless Today: CTIA's Semi-Annual Survey*, February 28, 2002. See *supra*, fn. 171.

¹⁷⁵ All of these trends have been corroborated by the Commission's own efforts at assembling data about the CMRS segment of telecommunications in the U.S. By the end of 2000, wireless telephony in the U.S. experienced an almost 40 percent penetration rate, while over 90 percent of the U.S. population had access to three or more CMRS carriers. See FCC, *In the Matter of Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Sixth Report ("Sixth CMRS Report"), released July 17, 2001, at 5-6. The Commission has also noted the increasing diffusion of digital technology in wireless telephony, the upsurge in competition among CMRS carriers, and average price declines for wireless services of 25 percent in 1999-2000 and 12.3 percent in 2000-2001. *Sixth CMRS Report*, at 6. Also see Table 2 of

175. The spectacular diffusion of CMRS services in the U.S. in recent years acquires a larger significance in the context of overall growth in telecommunications.¹⁷⁶ Recent FCC statistics show that, in July 2001, the subscribership rate for conventional wireline telephony in the U.S. had reached 95.1 percent of all households (or, nearly 107 million households).¹⁷⁷ Unlike wireless telephony, however, the annual gain in the number of wireline-subscribing households has remained relatively flat in recent years, rising approximately 8 percent between 1995 and 2001.¹⁷⁸ However, such flat growth is only to be expected when the subscribership *rate* is already so high (94 percent in 1995 and over 95 percent in 2001).¹⁷⁹ In contrast, a nascent (and now rapidly emerging) market for wireless telephony has prospects for dramatic growth for several more years. To put this into context, it may be noted that at an annual average exponential growth rate of 28.9 percent (see Table 18), wireless subscribership doubles every 2.4 years. At this torrid pace of growth, there can be little doubt that CMRS services have emerged as a strong and viable intermodal competitor (and substitute) for traditional wireline services.¹⁸⁰

176. Finally, the rapid expansion of coverage and the deployment of nationwide calling plans (along with the forbearance of long distance and roaming charges) signifies the ease with which the larger CMRS carriers have managed to entice subscribers looking for the “anytime, anywhere” connectivity traditionally associated with wireline

Appendix C in the *Sixth CMRS Report* for comparable state and national wireless subscribership data. This table shows that six out of the nine states in the BellSouth region (namely, Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee) experienced double-digit (and close to national average) rates of wireless subscribership growth between 1999 and 2000.

¹⁷⁶ Even with the recession and other economy-affecting events in 2001, many analysts expected wireless subscribership growth to remain strong, if not at the level of the previous two years. Lehman Brothers expected new subscribers to total 20.6 million in 2001. See *Technology Review*, April 23, 2002 or http://www.technologyreview.com/offthewire/3001_2342002_1.asp. Another source expected the industry to add only about 17 million new wireless subscribers in 2002. See *Wireless Week*, April 15, 2002, or <http://www.wirelessweek.com/index.asp?layout=story&articleId=LN45M7-F1D0-00H1-03S7-00000-00>.

¹⁷⁷ FCC Industry Analysis Division, *Telephone Subscribership in the United States*, February 2002, Table 1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., the discussion on “Wireless/Wireline Competition” in the *Sixth CMRS Report*, at 32-34.

carriers. The footprints of these carriers now take in not just densely-populated urban areas but extensive stretches of rural areas as well. Some CMRS carriers, in fact, clearly see no handicap in serving rural areas over urban areas, and have as their mission to provide service extensively in rural areas and to become the carriers of last resort—and wireline alternatives—in those areas. For example, in a recent FCC forum, Western Wireless lauded the Commission’s efforts to adopt a “market-based approach to regulation” and acknowledged that the result has been to make “CMRS ... the most competitive segment of the telecommunications industry.”¹⁸¹ Having specialized in serving only rural America, Western Wireless provides wireless services (including wireless local loop service) in 118 MSA and RSA markets, and is a designated eligible telecommunications carrier for universal service purposes in 12 states plus the Pine Ridge Indian reservation. Western Wireless claims to offer “rate plans and service offerings that are competitive with [those] of national carriers serving urban areas” and to offer a mix of CDMA, TDMA, and analog technologies (with GSM contemplated) through its network.¹⁸² Western Wireless’ example serves as a timely reminder that far from being constrained in extending service in supposedly hard or uneconomical-to-serve areas, some CMRS carriers have found it possible to ring up success stories in the marketplace without the need for additional regulation that would enable access to ILEC networks through mandatory unbundling.

177. At the individual CMRS carrier level, it is worthwhile examining the recent history of AT&T Wireless, Nextel, and VoiceStream, the three CMRS carriers that have petitioned the Commission to extend its unbundling rules to ILEC transport facilities. According to Nextel, all three belong to the club of CMRS carriers with national footprints (of which the three other members are Cingular Wireless, Verizon Wireless, and Sprint PCS).¹⁸³ The question that is worth asking is whether there is any indication in the recent financial performances of the three carriers to support the belief that they

¹⁸¹ Testimony of Mark Rubin, Western Wireless Corporation, at the CMRS Public Forum (for the 7th Annual CMRS Competition Report) organized by the FCC’s Wireless Telecommunications Bureau, February 28, 2002.

¹⁸² *Id.*

¹⁸³ Nextel Communications Inc. 10-K filed March 29, 2002, at 16.

have been impaired—as per the Commission’s criteria for impairment—by ILEC transport not being made available as UNEs. After all, whether or not one believes that the CMRS carriers that perform poorly in retail markets must somehow have been impaired at the wholesale stage, the stronger retail performance of more successful CMRS carriers certainly cannot be attributed to any wholesale-stage impairment. Hence, if the performance of AT&T Wireless, Nextel, and VoiceStream has improved steadily over time, then wholesale-level impairment (allegedly caused by the unavailability of ILEC transport as UNEs) cannot possibly have occurred.

178. Table 19 summarizes the recent financial performance of the three CMRS carriers.

Table 19. Performance Indicators of AT&T Wireless, Nextel, and VoiceStream, 1999-2001¹⁸⁴

Carrier Performance Indicator	2001	2000	1999	Percent Change 2000-2001	Percent Change 1999-2000	1Q2002	Annualized 1Q2002
AT&T Wireless							
Total subscribers (000)	18,047	15,163	9,567	19	59	19,500	21,450
Subscribers added (000)	2,928	2,565	1,531			650	2,600
Domestic revenues (\$ mill)	13,610	10,446	7,625	30	37		
Domestic service revenues (\$ mill)	12,532	9,374	6,823	34	37	3,355	13,420
Domestic service revenue per subscriber (\$)	694.41	618.22	713.21				
Cost of domestic revenues (\$ mill)	n/a	n/a	n/a				
Wholesale cost of domestic service revenues (\$ mill)	3,991	3,017	2,531	32	19		
Wholesale cost per subscriber (\$)	221.14	198.97	264.57				
EBITDA (\$ mill)	3,100	1,876	662	65	183	822	3,288
EBITDA margin (%)	24.7	20.0	17.4				
EBITDA per subscriber (\$)	171.77	123.72	69.20			42.15	153.29
Domestic net service revenue per subscriber (\$)	473.26	419.24	448.64				
Nextel							
Total subscribers (000)	8,700	6,680	4,520	30	48	9,202	10,708
Subscribers added (000)	1,990	2,160	n/a			502	2,008
Domestic revenues (\$ mill)	7,014	5,385	3,662	30	47	1,957	7,828
Domestic service revenues (\$ mill)	6,560	4,979	3,222	32	55		
Domestic service revenue per subscriber (\$)	754.02	745.36	712.83				
Cost of domestic revenues (\$ mill)	2,538	1,991	1,486	27	34		

¹⁸⁴ Some of the figures in the table are as reported in financial statements of the three carriers, and others have been calculated from original figures that appear on those statements. The sources for the figures in the table include 10-K filings and annual reports of the three carriers in 1999, 2000, and 2001, and various press releases posted on the web sites of the carriers, as well as analyst comments.

Wholesale cost of domestic service revenues (\$ mill)	1,290	955	n/a	35	n/a		
Wholesale cost per subscriber (\$)	148.28	142.96	n/a				
EBITDA (\$ mill)	1,901	1,395	372	36	275	586	2,344
EBITDA margin (%)	29.0	28.0	11.5				
EBITDA per subscriber (\$)	218.51	208.83	82.30			63.68	218.90
Domestic net service revenue per subscriber (\$)	605.75	602.40	n/a				
VoiceStream							
Total subscribers (000)	4,558	2,908	846	57	244	5,058	6,558
Subscribers added (000)	1,649	2,062	n/a			500	2,000
Domestic revenues (\$ mill)	3,379	1,935	476	75	306		
Domestic service revenues (\$ mill)	2,522	1,283	374	100	243		
Domestic service revenue per subscriber (\$)	553.26	441.19	441.77				
Cost of domestic revenues (\$ mill)	3,876	2,527	598	53	323		
Wholesale cost of domestic service revenues (\$ mill)	758	526	114	44	362		
Wholesale cost per subscriber (\$)	166.24	181.05	136.11				
EBITDA (\$ mill)	(497)	(592)	(121)	16	-388	64 ¹⁸⁵	256
EBITDA margin (%)	(19.7)	(46.1)	(32.5)				
EBITDA per subscriber (\$)	(109.08)	(203.45)	(143.40)			12.65	39.04
Domestic net service revenue per subscriber (\$)	387.02	260.14	306.96				

Note: All entries in the shaded columns are percentages. Entries (in particular, percentages) are subject to rounding. Italicized entries are projected (annualized).

¹⁸⁵ Adjusted EBITDA (excluding incentive bonuses related to the Deutsche Telekom AG merger) was \$75 million. See *T-Mobile International Reports Detailed First Quarter 2002 Results of VoiceStream*, VoiceStream press release, April 25, 2002. Also available from http://www.voicestream.com/about/press/press_20020425.asp.

Explanation of terms:

Total subscribers: the number of subscribers on record as being served by a carrier as of a certain date, e.g., December 31, 2001, or end-of-first quarter, 2002.¹⁸⁶

Subscribers added: (in most cases) the net gain in subscribers during a certain period, e.g., a year or a quarter. In some instances, subscriber gains have occurred through acquisition of other CMRS carriers.

Domestic revenues: revenues earned from all domestic operations (including providing service, sales of equipments such as handsets, etc.).

Domestic service revenues: revenues earned purely from the sale of domestic wireless services.¹⁸⁷

Domestic service revenue per subscriber: the average revenue earned per subscriber from the sale of domestic wireless services.

Cost of domestic revenues: cost to provide wireless services including all wholesale costs, the cost of selling equipment (handsets and accessories) to subscribers, retail costs (selling and marketing), and overhead costs (general and administrative).¹⁸⁸

Wholesale cost of domestic service revenues: wholesale costs to provide wireless services, which include the carrier's own network operation and maintenance costs, charges paid to other carriers for access, toll, and interconnection, and provisions for uncollectible receivables and changes in non-income related taxes.

Wholesale cost per subscriber: average (per subscriber) wholesale cost of domestic service revenues.

¹⁸⁶ For present purposes, this includes subscribers for post-paid services only, irrespective of whether they received analog or digital service. Pre-paid service customers are not included.

¹⁸⁷ For present purposes, only revenues from post-paid service and roamer charges are counted in this category. Revenues from pre-paid services are not included.

¹⁸⁸ Other operating expenses like depreciation and amortization and stock-based compensation are not included.

EBITDA: operating income before income taxes and depreciation and amortization. It is calculated as the difference between *domestic revenues* and the *cost of domestic revenues*, and is commonly used as the primary performance measure of a firm's ability to generate positive cash flow.

EBITDA margin: EBITDA as a percent of domestic service revenues.

EBITDA per subscriber: average cash flow per subscriber.

Domestic net service revenue per subscriber: average (per subscriber) margin between domestic service revenues and the wholesale cost of domestic service revenues.

179. In summary, Table 19 demonstrates the following about the three CMRS carriers:

- All three experienced robust subscriber growth between 1999 and 2001.¹⁸⁹ Despite the 2001 recession and slowdowns in the telecommunications industry generally, 1Q2002 results promise continued subscribership growth at or above three-year trends.
- All three (especially VoiceStream) experienced robust revenue growth (both all and service-only revenues) between 1999 and 2001. This happened despite external economic slowdowns, falling prices for wireless services, and increased competition among CMRS carriers. Actual 1Q2002 performance portends healthy revenue gains over prior periods.
- Service revenue per subscriber has trended up for all three carriers between 1999 and 2001. This indicates that, despite falling prices and more generous pricing plans and allowances, subscribers increased usage substantially to keep revenues rising.¹⁹⁰
- While all three have experienced rising costs (and, in particular, wholesale costs) to provide service, much of that cost increase can be attributed to subscribership growth and expansion of network operations. More significantly, the wholesale costs *per subscriber* of the three carriers have fallen or stayed flat through the 1999-2001 period.

¹⁸⁹ VoiceStream, in particular, experienced a surge in subscribership (almost 244 percent) after it became independent of Western Wireless, its original parent company. Subsequently, VoiceStream was acquired in 2001 by Deutsche Telekom AG, which brought in additional subscribers on the GSM digital wireless technology standard.

¹⁹⁰ Subsidies on handsets may have made it easier for subscribers to take service or increase usage. Despite lower prices for handsets, the total revenues of the three carriers posted healthy gains as well between 1999-2001.

- The most important performance indicator, EBITDA, has trended rapidly upward for AT&T Wireless and Nextel. Although VoiceStream experienced negative EBITDA between 1999-2001, the long-term trend is toward eventual profitability and positive cash flow. In fact, in 1Q2002, VoiceStream posted \$64 million in EBITDA which, despite the indifferent state of the economy, portends well for the carrier's future.
- EBITDA per subscriber has made impressive gains for AT&T Wireless and Nextel, while the negative EBITDA per subscriber for VoiceStream has been attenuated. In fact, based on 1Q2002 experience, VoiceStream could realize almost \$54 in EBITDA per subscriber in 2002. Despite the current sluggish economy, Nextel's EBITDA per subscriber in 2002 is likely to be little changed from the 2001 level, while AT&T Wireless' EBITDA per subscriber in 2002 may slip only a little from its 2001 level.
- After a brief dip in 2001, the domestic net service revenue per subscriber moved up impressively for AT&T Wireless and VoiceStream, while it moved up slightly for Nextel.¹⁹¹

180. Collectively, these "facts" about the financial performance of the three CMRS carriers point to one central fact: there is absolutely no evidence whatsoever that failure to provide ILEC transport facilities at (below-market) TELRIC-based prices caused substantial harm or, in any way, impaired the ability of the three carriers to acquire subscribers or grow despite difficult economic times. Taken together with the overall evidence about the financial performance of the entire CMRS segment of telecommunications, it is very hard to reach any conclusion supportive of the economic case made by CMRS carriers in this proceeding for being able to obtain ILEC transport on an unbundled basis. The only legitimate conclusion that can be reached, however, is that were such an unbundling request to be granted, the CMRS carriers that are already displaying the best performances in the telecommunications industry will only be handed a generous opportunity to augment their already handsome bottom lines.

¹⁹¹ This is an alternative to EBITDA per subscriber. It shows the "margin" earned (before taxes, depreciation and amortization, and other expenses) between service revenues and *wholesale* service costs. If a CMRS carrier experiences significant increases in wholesale costs (such as for interconnection and network facilities it owns or leases from ILECs), then this metric should be most sensitive to those cost increases. In contrast, the EBITDA per subscriber, which is based on *total* revenues and costs, may fail to clearly show the impact of changing wholesale costs.

181. It is important to consider just “how much” impaired the CMRS carriers are likely to be if the claims they have made in this proceeding are, indeed, true. In other words, is there an instrument or scenario that captures the predicament that the CMRS carriers supposedly find themselves in without the benefit of unbundled dedicated transport? Some insight into this question may be gained by examining the capital needs and capital expenditure patterns and priorities of the CMRS carriers. After all, as AT&T Wireless explains it, “... the wireless network relies to a large extent on wireline facilities, and especially on ILEC transport.”¹⁹² In a similar vein, Nextel admits that point-to-point microwave may be a “limited alternative” to ILEC transport, but CMRS carriers cannot be assured of the microwave option to serve its network needs ubiquitously. However, it concludes: “For this reason, Nextel and other CMRS carriers have largely come to rely upon ILECs to provide wired access between cell sites and CMRS MSCs. As a result, self-provisioning of the transport portion of a CMRS network is not common.”¹⁹³

182. While these statements may well demonstrate the central role that dedicated transport plays within a CMRS network (particularly, given the limitations of the microwave alternative), they do *not* sufficiently establish or explain why, from an *economic* standpoint, CMRS carriers cannot feasibly self-provision such transport. Ironically, it *is* clear why, after several years of manifestly successful operations, CMRS carriers have suddenly seized upon an opening provided by the *NPRM* to raise the specter of impairment if ILEC transport is not made available to them as a UNE. To understand why, consider the following claim by Nextel:

... ILEC refusal to provide this transport on terms other than as end user special access leaves CMRS carriers without effective recourse. CMRS carriers must obtain dedicated transport services from ILECs under the terms of special access tariffs or under contracts based on those tariffs. This impairs CMRS carriers not only because they must pay higher rates, but also because there is no statutory

¹⁹² *AT&T Wireless Services Comments*, at 24.

¹⁹³ *Nextel Comments*, at 6-7.

guarantee that the ILEC will provide its services in a dependable, non-discriminatory fashion.¹⁹⁴

183. This is patently a plea by the CMRS carriers to be allowed to obtain dedicated transport facilities from ILECs at prices that are lower (perhaps, significantly so) than those they currently pay for special access circuits. If paying the market-based, albeit higher than TELRIC-based, prices for special access circuits impairs and, specifically, causes competitive harm to CMRS carriers, there is certainly no evidence of it. By their own pronouncements, the CMRS carriers make it clear that business has never been better (despite the recent difficult economic times) and, in information they share with their shareholders, the analyst community, or the public, there is never any complaint about being prevented from achieving their goals (financial and competitive) by the failure of ILECs to provide unbundled dedicated transport.

184. For example, John D. Zeglis, AT&T Wireless' Chairman and CEO, recently offered this upbeat assessment:

AT&T Wireless continued its track record of growth with one of the best quarters of execution ever. We delivered solid gains for the first three months of the year, *despite an increasingly competitive market*. In the first quarter, we gave 650,000 more people an mLIFE, ending the period with 19.5 million customers, a 24 percent increase over the prior year's quarter, and 2.4 million more customers than we had just six months ago. At the same time, our aggressive programs to retain customers paid off in significant improvements, lowering churn yet again. We also increased our services revenue by nearly 15 percent. And we did it all while continuing a fast-paced deployment of our leading next generation network, which is progressing on schedule and on budget. As of today, we've built our new GSM network in about 60 percent of our footprint, covering a population of nearly 100 million people. We have launched new GSM/GPRS services in 26 major markets with more around the corner. In short, AT&T Wireless is more competitive and is offering our customers more valuable services than we did a year ago. Our network delivers a higher quality of service, our calling plans better meet customer needs, our offers include new advanced services, our target marketing is attracting additional, profitable customers from new segments, and our brand is

¹⁹⁴ *Id.*, at 8. Footnotes omitted.

increasingly trusted to take loyal customers to the next generation of wireless applications and devices.¹⁹⁵

At about the same time, Tim Donahue, President and CEO of Nextel, made the following statement:

I am very excited about Nextel's results for the first quarter. We set very aggressive targets for 2002 and we are on track to *meet or exceed them*. Compared with this time last year, subscribers are up 27%, cash flow is up 66%, and the cash flow margin is up to 32%. Nextel continues to lead the industry in subscriber quality, improve our market share and enhance our cash flow. Past investments in network infrastructure, along with technological advancements, are producing the highest network quality and service levels in our history, allowing Nextel to reduce capital spending and providing us with a clear path to positive free cash flow.¹⁹⁶

Echoing this sentiment, Jim Mooney, Nextel's Executive Vice President and COO stated:

Nextel is achieving financial and operational balance. Nextel is driving our market share higher and, when compared with last year's first quarter, Nextel grew revenue over 22% and added over \$230 million in quarterly cash flow. These results are driven by our industry vertical market segmentation and sales distribution strategies where sales through lower cost channels rose to 20% of total sales. At the same time, we are executing our cost cutting initiatives and strategic alliances aimed at reducing expenses producing an eight percentage point operating cash flow margin improvement over 2001's first quarter. We expect to *continue to reap the benefits of these actions in the coming quarters*.¹⁹⁷

Finally, Kai-Uwe Ricke, CEO of T-Mobile International and Member of the Board of Management, Deutsche Telekom AG spoke about VoiceStream (its U.S. subsidiary) thus:

¹⁹⁵ *AT&T Wireless Services Reports Strong First Quarter Services Revenue Increase of Nearly 15 Percent*, AT&T Wireless press release, April 23, 2002. Also available from http://www.attws.com/press/releases/2002_04/042402.html. Emphasis added.

¹⁹⁶ *Nextel Reports Strong First Quarter 2002 Results*, Nextel press release, April 17, 2002. Also available from http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=NXTL&script=410&layout=7&item_id=280044. Emphasis added.

¹⁹⁷ *Id.* Emphasis added.

VoiceStream achieved positive EBITDA for the first time this quarter while continuing its very strong subscriber growth. VoiceStream achieved the strong growth in EBITDA by managing its costs carefully. VoiceStream's cost drivers and churn are heading in the right direction while ARPU remains steady.¹⁹⁸

In addition, Robert Dotson, President and COO of VoiceStream, said:

Our Get More subscriber offering continues to be compelling to wireless users. VoiceStream has always been a leader in the consumer market. We are now seeing growth in the business segment as well, which we attribute to our growing national scope, attractive WorldClass International roaming rates with T-Mobile and our competitive advantage of offering the only ubiquitous [sic] high-speed data network (iStream) across our entire footprint. *All of this is leading to continued strong growth for VoiceStream in a highly competitive [sic] market.*¹⁹⁹

185. These confident and celebratory public statements of the most senior officials of the three CMRS carriers do not conjure up a persuasive picture of impaired and competitively harmed entities for which salvation only lies in requiring ILECs to offer dedicated transport on an unbundled basis. While clearly recognizing how competitive the CMRS industry segment is, these officials also identify the particular strengths that their companies have relied on to experience strong growth, namely, investment in new cellular technologies, additional spectrum purchases, product differentiation, new sales channels and marketing strategies, etc. These are not actions of impaired firms, and attempts by the three CMRS carriers to benefit their bottom lines should not be confused with a genuine competitive disadvantage.

186. In the ultimate analysis, the observed choices and actions of CMRS carriers speak louder than words. If dedicated transport facilities are such an integral part of their networks, surely the CMRS carriers would see it in their long run economic interest to replace leased circuits with their own? ILECs do not have a monopoly on fiber or fiber-based facilities. There are no market or regulatory constraints on CMRS carriers acquiring their own facilities. The only likely explanation for their choosing not to do

¹⁹⁸ *T-Mobile International Reports Detailed First Quarter 2002 Results of VoiceStream*, VoiceStream press release, April 25, 2002.

¹⁹⁹ *Id.* Emphasis added.

so (e.g., VoiceStream claims that 96 percent of its circuits linking base stations with MSCs are leased from ILECs²⁰⁰) is that self-provisioning cannot yield significant savings over leasing special access circuits from ILECs. Hence, leasing frees those carriers up to pursue capital expenditures in other parts of their networks, for which economically leased options are *not* available from ILECs.

187. Both AT&T Wireless and Nextel claim to have adequate resources (from their existing cash balances, cash from sales and other operations, and external funds) to finance their capital requirements into the foreseeable future.²⁰¹ Particularly illuminating are the priorities that these carriers have for undertaking capital expenditures. AT&T Wireless' capital expenditures in 2001 reached \$5 billion, of which 20 percent was directed at their nascent GSM/GPRS data network and the other 80 percent went to its existing TDMA network. About the same level of capital expenditure is expected in 2002, with nearly two-thirds now directed toward the GSM/GPRS network. In 2001, AT&T spent \$1.5 billion on next generation network and handset development.²⁰² Significantly, against these large capital outlays and similar spending on acquisitions and other restructuring, AT&T Wireless spent only \$300 million on dedicated transport lines leased from ILECs.²⁰³ This represented only about 7 percent of the nearly \$4 billion that AT&T Wireless incurred in wholesale costs to provide wireless service in 2001.

188. Similarly, in 2001, Nextel's capital expenditures reached \$2.47 billion and was directed primarily toward network construction activity (placement of switches, transmitter and receiver sites, and related equipment), licenses, acquisitions, etc.²⁰⁴ It is not clear how much of that spending was channeled into self-provisioning of dedicated transport facilities. In fact, there seems to be little room for such spending in

²⁰⁰ *VoiceStream Comments*, at 15.

²⁰¹ *AT&T Wireless Annual Report 2001*, at 14; Nextel Communications Inc. 10-K filed March 29, 2002, at 60.

²⁰² *AT&T Wireless Annual Report 2001*, at 15.

²⁰³ *Id.*, at 17.

²⁰⁴ Nextel Communications Inc. 10-K filed March 29, 2002, at 60-62.

the future. Among its capital spending priorities are the construction of additional transmitter and receiver sites, increments to system capacity and maintenance of service quality, installation of related switching equipment, enhancement of mobile network coverage around major domestic market areas, enhancements to the existing iDEN technology to increase voice capacity and improve packet delivery speeds, and the deployment of new technologies. Although Nextel does not explicitly report its actual expenses on leased facilities, there does not appear to be overt concern about how its current spending on those facilities is threatening its ability to compete or offer the services of its choosing.

189. The inescapable conclusion from this detailed examination of the circumstances of the three CMRS carriers is that, apart from experiencing the usual teething troubles of a relatively new but rapidly growing industry segment, they have weathered both economic slowdowns and vigorous competition quite well. The prognosis, far from signifying cumulative competitive harm, remains very hopeful, and the CMRS industry segment as a whole seems intent on diversifying its technological standards and offering even more value-added services based on next generation network technologies.
190. More significantly, the CMRS carriers have entered the Commission-sponsored debate over whether unbundling rules should depend on the types of service being offered more with opportunistic intent than with plain and hard facts to bolster their case. In the absence of any rigorous demonstration of how they have been impaired or competitively harmed by existing ILEC leasing policies, and in the face of incontrovertible financial and performance evidence that run contrary to their claims, the CMRS carriers have failed to make a persuasive case to win unbundled access to ILEC dedicated transport facilities. The generalities that lace their economic arguments (e.g., "ILECs have a monopoly over inter-office transport facilities," or "tariffed prices of special access circuits have risen since pricing flexibility was granted to ILECs," or "special access prices cause competitive harm to CMRS carriers") have no empirical support, and the three CMRS carriers have made no effort to provide any.

The CMRS carriers, or representatives of that industry segment, must have the burden to make their case affirmatively with more tangible and credible evidence. Therefore, we conclude that the circumstances of the requesting carrier—in particular, the services it offers—*should* matter for making an enlightened policy decision regarding ILECs' unbundling obligations.

191. Finally, the CMRS providers fail to address the threshold economic issue: whether mandatory unbundling of network elements should be required to support services other than wireline local exchange service. From an economic perspective, the necessary and impair standard (as well as the essential facility standard in antitrust economics) makes explicit reference to the downstream product or service market involved. In theory, mandatory provision of unbundled network elements or essential facilities involves welfare tradeoffs. Costs and inefficiencies are imposed on the suppliers of the network elements that, in principle, are more than offset by the social gains from the competition in the downstream retail markets made possible by the mandatory unbundling requirement. If there is no gain from new competition in a particular downstream retail market, there is no reason to incur the costs of unbundling to support competitors in that market.²⁰⁵ Thus, because there is likely to be no beneficial increase in competition among CMRS suppliers (or among long distance providers) from making transport available as a UNE (rather than as an ordinary tariffed service), consumers would ultimately be worse off if the unbundling requirements were extended to these markets.

192. This concludes our Reply Declaration.

²⁰⁵ For example, the railroad bridge in the *Terminal Railroad* case was deemed an essential facility because allowing multiple railroads to use it opened up a number of markets in the Mid-West to multiple competitors. That fact does not imply that the bridge owners should make it available to others for fishing or sightseeing because there would be no offsetting social gain from increased competition in those markets.

**Before the
Federal Communications Commission
Washington, D. C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act of)	
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

REPLY COMMENTS

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Date: July 17, 2002

BellSouth Reply
CC Docket No. 01-338
July 17, 2002

of any carrier having to share facilities at below market rates. It should declare that there are no impairments to the provision of advanced services, that ILECs need not unbundle their broadband networks, and that states may not take any action inconsistent with these determinations.

V. CMRS PROVIDERS ARE NOT IMPAIRED WITHOUT ACCESS TO ILEC UNES.{ TC "V. CMRS PROVIDERS ARE NOT IMPAIRED WITHOUT ACCESS TO ILEC UNES." \f C \l "1" }

A. The Commission Should Undertake a CMRS Specific Impairment Analysis.{

TC "A. The Commission Should Undertake a CMRS Specific Impairment Analysis." \f C \l "2" }

The Commission seeks comment on whether it should evaluate the specific services a requesting carrier seeks to offer when determining which elements should be unbundled under section 251(d)(2).¹⁴⁵ Further the Commission asks whether the level of competition for a particular service should be considered.¹⁴⁶ Invoking the example of CMRS providers' access to UNEs, the Commission further inquires whether particular market characteristics should impact its unbundling determinations.¹⁴⁷ CMRS carriers have commented that such a service-specific analysis would be inappropriate and possibly unlawful.¹⁴⁸ BellSouth disagrees. Without a specific analysis of services, the Commission is lacking what it needs to determine if, in fact, impairment exists without access to certain unbundled network elements.

As the Supreme Court said in *Iowa Utilities Board*, "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission

¹⁴⁵ *NPRM* at 22799, ¶ 37.

¹⁴⁶ *Id.*, ¶ 38.

¹⁴⁷ *Id.*

¹⁴⁸ *See* Comments of Arch Wireless, Inc. at 5 and AT&T Wireless Services, Inc. at 17.

has come up with, it would not have included 251(d)(2) in the statute at all.”¹⁴⁹ Instead, the necessary and impair standard was incorporated into the Act to ensure that the Commission “determine on a rational basis which network elements must be made available.”¹⁵⁰ The U.S. Appeals Court for the D.C. Circuit recently held that Congress made impairment the “touchstone” of the 251(d)(2) unbundling analysis.¹⁵¹ “But to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.”¹⁵² Here, the Court’s decision in remanding the Local Competition Order supports the arguments made by BellSouth, Verizon and SBC that the Commission must conduct a separate impairment analysis before it can allow access to UNEs by wireless carriers.¹⁵³ If an impairment analysis specific to wireless services is not conducted, the Commission will be blatantly ignoring the legislative intent of the Act.

B. Wireless Carriers Are Not and Cannot Be Considered Impaired.{ TC "B. Wireless Carriers Are Not and Cannot Be Considered Impaired." \f C \l "2" }

The wireless carrier commenters have all asserted that they are impaired without access to UNEs, specifically unbundled dedicated transport.¹⁵⁴ Oddly, this supposedly impaired

¹⁴⁹ *Iowa Utilities Board*, 525 U.S. at 390.

¹⁵⁰ *Id.* at 391-92.

¹⁵¹ *USTA v. FCC*, 290 F.3d at 425.

¹⁵² *Id.*

¹⁵³ *See generally*, BellSouth Comments at 46-59, Verizon Comments at 38-40, and SBC Comments at 24-25.

¹⁵⁴ *See generally*, Comments of VoiceStream Wireless, Inc., AT&T Wireless Services, Inc. Arch Paging, Inc., Nextel Communications, Inc., Progress Telecom Corporation, Dobson Communications Corp, and the Cellular Telecommunications & Internet Association.

industry has continued to thrive even during a national economic downturn. As of July 5, 2002, the wireless industry boasts an impressive 137.4 million subscribers,¹⁵⁵ 4 million more subscribers than it had three months ago.¹⁵⁶ Further, industry data shows that wireless carriers have been able to increase market penetration, add a substantial number of cell sites, and decrease operating expenses all at the same time. In the face of clear evidence of their success as intermodal competitors, and the promising prognosis for continued strength and competitive progress, their remarkable success at the retail level simply could not have been possible if they had been impaired at the wholesale level.¹⁵⁷

For example, the CTIA's own survey data showed subscriber growth up 17.3% from December 2000 to December 2001.¹⁵⁸ Similarly, revenues increased 22.6% during the same time period.¹⁵⁹ Of particular significance was a 22.3% growth in the number of cell sites while capital investment only increased 17.2%.¹⁶⁰ When subscriber growth and network growth clearly exceed investment expense increases, it is difficult, if not impossible, to conclude that the wireless industry is impaired without UNEs.

Despite the impressive growth statistics and self-proclaimed success,¹⁶¹ the CMRS providers continue to cry impairment. The wireless carriers would have the Commission believe

¹⁵⁵ CTIA's World of Wireless Communications, <http://www.wow-com.com>, as of July 5, 2002.

¹⁵⁶ *Id.* as of March 31, 2002.

¹⁵⁷ NERA Reply Decl. at 111-12.

¹⁵⁸ CTIA's Wireless Industry Indices: 1985-2001. CTIA's World of Wireless Communications, <http://www.wow-com.com>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ AT&T Wireless Comments at 18. See NERA Reply Declaration, Table 18 for data released by CTIA demonstrating that CRMS providers have performed spectacularly on a number of different indicators.

that they are impaired because there are no suitable alternatives to ILEC transport facilities, completely ignoring self-provisioning as an option. However, many of their woes can simply be attributed to costs. For example, AT&T Wireless alleges that self-provisioning would be too costly to cover its national footprint.¹⁶² Nextel states that while “CMRS carriers could build their own landline facilities to each cell site, such an expense would represent a daunting additional expense.”¹⁶³ VoiceStream Wireless argues that because it is “not in the business of constructing landline circuits” it should be entitled to UNE pricing because it has to cover a substantial amount of ground to connect its network of cell sites.¹⁶⁴

Such arguments are absurd. The car manufacturer who is “not in the business” of producing tires knows full well it must provide tires to a customer. Neither the car manufacturer nor the government would expect that the tire manufacturer sell the tires to the car company at cost-based rates. But that is exactly what the wireless carriers are asking for here. VoiceStream goes so far as to state that, by obtaining UNE pricing, “CMRS carriers could lower their recurring operating costs.”¹⁶⁵ Cheaper rates offered to *any* business by a supplier would cause the business to lower its operating costs. But simply having to pay a supplier at rates above cost-based rates is not sufficient to claim impairment. The Supreme Court stated in *Iowa Utilities Board* and the D.C. Circuit recently reaffirmed in *USTA v. FCC* that cost alone is not sufficient to prove impairment.¹⁶⁶ The cost disparity underlying a claim of impairment must relate to the

¹⁶² AT&T Wireless Comments at 11.

¹⁶³ Nextel Comments at 7.

¹⁶⁴ VoiceStream Comments at 7.

¹⁶⁵ VoiceStream Comments at 4.

¹⁶⁶ “To rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act’s unbundling provisions.” *USTA v. FCC*, 290 F.3d at 427.

ILEC's possession of an economy of scale that approaches a natural monopoly and the facts on the ground indicate that ILECs have no natural monopoly on interoffice transmission facilities, which have been competitively provisioned for nearly two decades, and which have seen a significant build out of CLEC networks and competitive sources of transport in the BellSouth region in the past three years.¹⁶⁷

In their comments, the wireless carriers have failed to acknowledge the goal of the Act: to allow new entrants into the marketplace and afford them access to an incumbent's network in order to promote and foster competition that would ultimately result in competitive pricing between the incumbent and the new entrant. In the wireless arena, the CMRS providers are hardly new entrants. The wireless industry has been around for nearly twenty years.¹⁶⁸ The wireless carriers had established their own networks long before the Act. And while those networks have further expanded and developed, the carriers were able to do so without UNEs and still grow in infinite proportions and reach substantial revenues over \$65 billion in 2001.¹⁶⁹ Although the CMRS provider is considered a "telecommunications carrier," it is not the "new entrant" that Congress intended to compete for local wireline subscribers. As such, the Act, the Commission's rules, and judicial decisions interpreting those rules, have repeatedly left out any analysis as it pertains to wireless carriers. Wireless carriers are not impaired without access to ILEC UNEs. Further, wireless carriers themselves have proven that wireless services can be a true form of intermodal competition without the need for UNEs. The wireless industry has

¹⁶⁷ NERA Reply Decl. at 97-106.

¹⁶⁸ CTIA's Wireless Industry Indices: A Comprehensive Report on CTIA's Annual Data Survey Results, July 2001, at 1.

¹⁶⁹ *Id.*

achieved, through a comparatively less regulated federal framework than the wireline industry, the goals of deregulatory, facilities-based competition envisioned by the Act.

Indeed, wireless pricing is truly competitive with wireline ILEC pricing.¹⁷⁰ In some cases, wireless carriers are offering services to consumers for rates lower than wireline ILEC providers. As such, there is no rational basis for the Commission to conclude that wireless carriers are somehow impaired without access to UNEs. To do so would make UNEs available in “many markets where there is no reasonable basis for thinking that competition is suffering from a impairment of a sort that might have been the object of Congress’s concern.”¹⁷¹

At the individual CMRS carrier level, it is worthwhile to examine the recent history of AT&T Wireless, Nextel, and VoiceStream, the three CMRS carriers that have petitioned the Commission to extend its unbundling rules to ILEC transport facilities. NERA does so, exhaustively, in the attached Reply Declaration at pages 116-129. All three carriers experienced subscriber growth since the *UNE Remand Order*. All three experienced robust revenue growth despite economic slowdowns, falling prices for wireless services and increased competition among CMRS carriers. Service revenue per subscriber trended upward. And while all three experienced rising costs, including wholesale costs to provide service, much of that cost increase can be attributed to subscribership growth and expansion of network operations—the wholesale costs per subscriber of the three carriers have actually fallen or stayed flat during the last three years.¹⁷²

Moreover, NERA proves that the CMRS carriers do not sufficiently establish or explain why, from an economic standpoint, CMRS carriers cannot feasibly self-provision dedicated

¹⁷⁰ See NERA Reply Decl. at 114.

¹⁷¹ *USTA v. FCC*, 290 F3d at 422.

¹⁷² NERA Reply Decl. at 116-22 & Table 19.

transport.¹⁷³ The CMRS providers are simply pleading for special access circuits at prices that are significantly lower than those they currently pay, and have not provided any evidence of competitive harm to CMRS carriers. Further, confident and celebratory public statements of the most senior officials of the three petitioning CMRS carriers **do not** conjure up a persuasive picture of impaired and competitively harmed entities for which salvation only lies in requiring ILECs to offer competitive transport on an unbundled basis.¹⁷⁴ Fundamentally, these carriers have entered this debate more with opportunistic intent than with plain hard facts, in the absence of any rigorous demonstration of how they have been impaired or competitively harmed, and in the face of incontrovertible financial and performance evidence that controvert their own claims, they fail to make a persuasive case.¹⁷⁵

C. The Commission Should Not Broaden the Definition of Transport.{ TC "C.
The Commission Should Not Broaden the Definition of Transport." \f C \l "2"
 }

Several carrier commenters, both wireless carriers and CLECs, have asserted that the Commission should broaden its definition of dedicated transport to include facilities within a wireless network, specifically those circuits from cell sites to switching centers.¹⁷⁶ The carriers are seeking a broader definition because, under the current rules, a facility between a cell site and an end office or switch does not meet the Commission's definition of transport.¹⁷⁷ The carriers

¹⁷³ *Id.* at 123.

¹⁷⁴ *Id.* at 126.

¹⁷⁵ *Id.* at 128-129.

¹⁷⁶ *See, e.g.,* Nextel Comments at 8-9 and VoiceStream Comments at 8-9.

¹⁷⁷ 47 C.F.R. § 51.319(d)(1)(i). *See also* BellSouth Comments at 55.

would like the Commission to believe that such circuits meet the definition of transport.¹⁷⁸

However, the carriers themselves admit that the “interplay” between the cell site and the switch is necessary for call transmission.¹⁷⁹ Therefore, BellSouth urges the Commission to review the wireless carriers’ own vendors’ network technical specifications, which demonstrate that a cell site is not the functional equivalent of a switch, and cannot be considered a switch of any kind.¹⁸⁰

The Commission should not expand the scope of its transport definition for two reasons. First, ILECs are not required to unbundle new facilities.¹⁸¹ ILECs provision facilities to cell sites for the sole use of the CMRS provider.¹⁸² There would have been absolutely no need for an ILEC to install and maintain such facilities other than to satisfy the request of a wireless carrier customer. Indeed, the point-to-point transmission facilities to cell sites were not, and are not, part of the ILEC’s existing underlying network. Second, for the reasons stated above as well as in BellSouth’s initial comments, wireless carriers are simply not impaired without access to UNEs.

In addition, AT&T Wireless has requested that SONET be included within the Commission’s definition of dedicated transport.¹⁸³ BellSouth urges the Commission to dismiss such a request. Although a SONET ring may be pieced together using some existing ILEC facilities, all rings deployed for CMRS providers are, in essence, newly constructed facilities

¹⁷⁸ AT&T Wireless Comments at 28.

¹⁷⁹ *Id.*

¹⁸⁰ See BellSouth *ex parte* filed August 22, 2001 in CC Docket No. 96-98.

¹⁸¹ *UNE Remand Order*, 15 FCC Rcd at 3843, ¶ 324.

¹⁸² The facilities may also be provisioned for the use of a CLEC serving a CMRS carrier customer. It is important for the Commission to note that wireless carriers are attempting to game the ILECs by using CLECs to order UNE transport facilities to cell sites on their behalf. BellSouth asserts that such use of UNEs by a CLEC is also improper because the UNE is being ordered to ultimately provide wireless services.

¹⁸³ AT&T Wireless Comments at 30-32.

and, therefore, not subject to unbundling requirements.¹⁸⁴ Again, there is no evidence to support a finding of impairment by the wireless industry without access to unbundled SONET. As explained by BellSouth, inter-office transmission facilities such as dedicated transport may only be provided as UNEs to link switches or wire centers.¹⁸⁵

D. CMRS Carriers Should Pay Termination Liability{ TC "D. CMRS Carriers Should Pay Termination Liability" \f C \l "2" }.

In anticipation of a favorable ruling by the Commission, both VoiceStream and AT&T Wireless have suggested opportunistically that the Commission allow them to abrogate their contractual duties with ILECs in order to avoid termination liabilities resulting from potentially converting existing special access arrangements to UNEs.¹⁸⁶ AT&T Wireless alleges that it has been "forced to utilize ILEC special access facilities"¹⁸⁷ despite the fact that it never even requested UNEs from BellSouth until 2001. To date, these carriers have purchased tariff services from BellSouth under discounted volume or term arrangements. Because the term arrangements have termination charges, the carriers seek to avoid them by claiming they were forced to enter into these arrangements. However, rather than paying the higher priced month-to-month charges, the carriers have generally paid lower rates than they would have paid if they were not under contract. In exchange for these favorable rates, CMRS providers agree to pay termination liabilities in the event the contracts are terminated early. Now, the wireless carriers are asking the Commission to not only allow them to convert certain special access circuits to UNEs but also avoid their obligations as set forth in the tariff. The Commission should not alter

¹⁸⁴ See BellSouth Comments at 56-57, stating that all SONET rings are built to exact carrier capacity requirements and specifications.

¹⁸⁵ NERA Reply Decl. at 111.

¹⁸⁶ VoiceStream Comments at 16; AT&T Wireless Comments at 32.

¹⁸⁷ AT&T Wireless Comments at 36.

or otherwise impair the obligations between ILECs and wireless carriers established by lawful tariffs. Moreover, doing so would essentially discriminate against two other classes of customers: (1) those carriers who do have to pay termination liabilities for early terminations, and (2) those carriers who purchase services on a month-to-month basis paying a higher rate precisely because they did not want to possibly incur termination penalties. Accepting the position of AT&T Wireless and VoiceStream would discriminate against both these classes of customers.

Further, AT&T Wireless is calling for a “fresh look” at its contracts in light of its belief that it is entitled to UNEs.¹⁸⁸ First, BellSouth believes that this request is wholly premature. Until the Commission rules otherwise, wireless carriers are not entitled to UNEs. Second, the “fresh look” approach is not universally accepted as it allows the Commission to interfere with a bargain that was freely entered into by two parties that are more than capable of understanding the consequences of their actions. The Commission should not abrogate contractual arrangements that were knowingly entered into by the parties. For example, at the time AT&T Wireless signed its latest volume and term agreement with BellSouth, AT&T Wireless was made aware that BellSouth was not going to provide AT&T Wireless access to UNEs and purchasing into the services pursuant to a term plan arrangement would, in fact, result in termination liability if AT&T Wireless sought to terminate the arrangement prior to expiration. Instead of choosing a higher priced month-to-month service with no termination penalties, AT&T Wireless simply availed itself of the cheapest price it could without regard for the consequences. Accordingly, the Commission should not interfere term arrangement between BellSouth and AT&T Wireless or between any ILEC and CMRS provider.

¹⁸⁸ AT&T Wireless Comments at 32.

Respectfully submitted,

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Date: July 17, 2002

**Before the
Federal Communications Commission
Washington, D. C. 20554**

In the Matter of)	
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COMMENTS

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BellSouth Comments
CC Docket No. 01-338
April 8, 2002

need for travel and centralized offices; or, videoconferencing to allow doctors to collaborate with specialists around the world, thus eliminating the patient's need to endure costly travel. These kinds of changes will require the connection speeds that TechNet envisions and the billions of dollars of investment it recognizes will be necessary to make those speeds possible.¹⁵⁴

Whether this dream will ever be realized rests in large part with the Commission. As demonstrated above, no investor will incur the risk and spend billions of dollars on infrastructure that will then be turned over to one of its competitors at below cost pricing. If the Commission continues to require the unbundling of broadband network elements, it will be effectively telling the ILECs "we do not want you in the broadband market, we are reserving that market for your competitors." Closing the market to one competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability. The Commission must therefore heed the marketplace signals emanating from analysts, technology companies, not to mention the pro-competitive rhetoric of individual Commissioners. It must not require the unbundling of network elements used to provide advanced telecommunications capabilities.

VI. WIRELESS PROVIDERS ARE NOT IMPAIRED WITHOUT ACCESS TO UNEs

The Commission seeks comment on whether Section 251(d)(2) requires it to take into account the type of service a requesting carrier seeks to offer, as well as how the level of competition for a particular service affects the availability of UNEs.¹⁵⁵ Because section 251 provides for limited unbundling of ILEC network elements in order to facilitate competition with incumbent wireline providers of local telephone exchange service where the lack of access to the

¹⁵⁴ See also the general discussion in 2002 UNE Fact Report, Section V-D.

¹⁵⁵ *NPRM*, ¶ 37. Specifically, the Commission asks "if an element is unbundled for one service, should we limit its availability to that service, or should we permit it to be used for any service?" *Id.* at ¶ 38.

ILEC's elements would impair a requesting carrier's ability to provide service due to a lack of competitive alternatives or the inability to self-provision those elements, the Commission should take into account the type of service that the requesting carrier seeks to offer.

Because multiple wireless service providers have become highly competitive to wireline carriers without prior access to ILEC UNEs, wireless services are a prime example of services that should not be eligible for access to ILEC UNEs.¹⁵⁶ The Commission must analyze wireless service providers as a class distinct from the facilities-based and non-facilities based CLEC class of wireline service provider that it evaluated in its earlier proceeding. Fundamentally, the Commission must evaluate, in the first instance, whether wireless providers are impaired in the provision of telephone exchange service without access to existing ILEC UNEs.¹⁵⁷ Because marketplace evidence demonstrates that wireless services have long been and continue to be competitively and successfully provided without access to UNEs, the Commission cannot conclude that these carriers are in any way impaired in their ability to provide service without access to ILEC UNEs.

The Commission has historically treated wireless carriers as a class separate and distinct from wireline carriers. Wireless carriers are governed by separate rules,¹⁵⁸ regulations, and licensing requirements. Neither Congress¹⁵⁹ nor the Commission has ever considered CMRS providers to be "local exchange carriers," with the full panoply of regulatory burdens associated

¹⁵⁶ While ILEC affiliates rank as robust competitors in wireless markets, unaffiliated wireless carriers are more than holding their own, and serve approximately 40% of the wireless market. 2002 Fact Report at V-20 – 21.

¹⁵⁷ See *BellSouth ex partes* filed June 19, 2001 and August 22, 2001 in CC Docket No. 96-98.

¹⁵⁸ See 47 C.F.R. § 20.1 *et seq.*

¹⁵⁹ 47 U.S.C. § 153(26).

with that status.¹⁶⁰ In its initial phase of UNE implementation, neither the *Local Competition Report and Order* nor the *UNE Remand Order* contemplated access to UNEs by wireless service providers. In both orders the Commission discusses in great detail competition between incumbent LECs and competitive LECs. Absent in both is any analysis of how wireless carriers could or should fit into section 251's unbundling mandate. And conspicuously absent in both proceedings is meaningful participation by any wireless provider (or its trade association) advocating the position that they are impaired without access to ILEC UNEs or are otherwise entitled to ILEC UNEs.¹⁶¹ Wireless carriers were then and are now functioning and competing on their own without the need of Commission intervention.¹⁶²

In fact, it was not until 2001, well into the current economic downturn described in section II.B above, that BellSouth ever received a request from a wireless carrier for access to UNEs.¹⁶³ By this time, wireless penetration, indeed, wireless substitution, had reached substantial and compelling levels.¹⁶⁴ In placing this issue before the Commission in this proceeding petitioners boasted of the success of wireless substitution, "CMRS providers offer true facilities-based competitive alternatives to incumbent LECs. Increasingly, they are viewed

¹⁶⁰ *First Report and Order*, 11 FCC Rcd at 15995-96, ¶¶ 1004, 1006. Moreover, Congress authorized ILEC wireless affiliates to enter long-distance markets immediately upon passage of the 1996 Act, without waiting for any unbundling or section 271 checklist approval by their wireline affiliates. 2002 Fact Report at V-20. This demonstrates that U.S. wireless markets were robustly competitive and that, unlike competitors in the wireline local telephone exchange market, Congress did not contemplate the possibility that wireless carriers could potentially be at least temporarily impaired without access to ILEC UNEs.

¹⁶¹ This lack of participation indicates that wireless carriers did not then view ILEC UNEs as essential to the provision of wireless services, and certainly did not see themselves as impaired without access to those UNEs.

¹⁶² CMRS providers have had no difficulty obtaining special access from the ILECs through non-UNE agreements. Shelanski Decl., ¶ 52.

¹⁶³ This timing is also coincident with the wireless industry's increasing realization that it will have to incur substantial costs in implementing regulatory mandates such as E-911, local number portability, and thousands-block number pooling.

¹⁶⁴ 2002 UNE Fact Report at II-35 – II-37.

as full-fledged competitors of landline carriers in the provision of telephone exchange service.”¹⁶⁵ The motivation of the wireless carriers is purely economic; the alleged impairment is solely to their ability to continue to amass profits at pre-downturn levels, contrary to the Supreme Court’s instruction on the proper consideration of cost in a section 251 impairment analysis.¹⁶⁶ Wireless carriers, directly and indirectly through the niche CLECs (affiliated or unaffiliated) that serve them, have been successfully engaged in direct competition with ILECs without access to ILEC UNEs. It is understandable that these carriers now seek regulatory leverage to increase profit margins by obtaining UNE pricing to reduce overall cost inputs; that does not mean that such access is mandated by law or marketplace evidence.

There is simply no evidence that a lack of access to UNEs has impaired wireless carriers in their successful conquest of business and consumer markets nationwide. The wireless industry itself has proclaimed, “the only real residential competitors today are wireless carriers. A recent study reported that 10 million Americans had cut the cord and were using wireless instead of having any wireline connection.”¹⁶⁷ The wireless market is a strong, vigorous market that has grown substantially under current market conditions and the FCC’s relatively “light touch” regulatory policies, demonstrating without doubt that wireless carriers are not impaired by not having access to UNEs. For example, as of March 2002, there were over 133 million mobile service subscribers in the United States as compared to the 189 million switched wireline

¹⁶⁵ Petition for Declaratory Ruling by AT&T Wireless and VoiceStream Wireless Corp. at 3, CC Docket No. 96-98 (filed Nov. 19, 2001) (“AT&T/VoiceStream Petition”).

¹⁶⁶ *Iowa Utils. Bd.*, 525 U.S. at 390.

¹⁶⁷ Letter of Thomas E. Wheeler, President/CEO CTIA to Chairman Michael K. Powell, January 24, 2002.

subscribers, indicating that parity has surely been reached in most, if not all, markets.¹⁶⁸

Wireline CLECs, whose access line counts range from 20-25% of the total wireless subscribership, are clearly not impaired without access to the types of UNEs now sought by wireless carriers. It makes a mockery of “impairment” for wireless providers, at or near market parity with ILECs in terms of subscribership, to contend that they are “impaired” without access to these same UNEs.

Further, the wireless industry *adds* approximately 20 million additional subscribers, the substantial equivalent of *BellSouth's total region-wide access line count*, each year.¹⁶⁹ Analysts believe that the significant increase in subscribers is attributed to wireless service being viewed as a “cost effective and compelling alternative to wireline.”¹⁷⁰ Even more compelling is evidence that many wireless subscribers are abandoning use of traditional wireline services all together. “IDC believes that the wireless substitution rate for additional access lines will increase beginning in the 2002-2003 time frame, as wireless pricing continues to drop.”¹⁷¹ The phenomenal subscriber growth in the wireless industry can be attributed to the decrease in the cost of wireless services as “wireless service pricing is rapidly approaching wireline pricing.”¹⁷² In some cases, with bundled pricing packages that including long distance, wireless carriers offer

¹⁶⁸ CTIA's World of Wireless Communications, <http://www.wow-com.com> as of March 31, 2002. See also CTIA's Semi-Annual Wireless Industry Survey Results, June 1985 to June 2001, http://www.wow-com.com/pdf/wireless_survey_2000a.pdf.

¹⁶⁹ See CTIA's Semi-Annual Wireless Industry Survey Results, June 1985-June 2001. BellSouth had 25.6 million access lines as of Sept. 30, 2001.

¹⁷⁰ S. Ellison, IDC, *Wireless Displacement of Wireline Forecast and Analysis*, 2001-2005 (Dec. 2001).

¹⁷¹ *Id.*

¹⁷² *Id.* That wireless costs are actually decreasing is even more reason for the Commission to look skeptically at any claims that wireless carriers are impaired without access to ILEC UNEs.

consumers pricing substantially lower than those for equivalent wireline services.¹⁷³ The ability to price competitively was one of the reasons the Commission required the ILECs to unbundle certain network elements.¹⁷⁴ Today, the wireless industry demonstrates that it is able to price competitively, even lower, than ILECs, without the added regulatory benefit of UNEs. Dramatic subscriber growth demonstrates that the wireless industry is not impaired without access to UNEs. The Commission determined that as competitors acquire more customers, reliance on the ILECs' facilities would diminish.¹⁷⁵ To grant wireless providers access to ILEC UNEs in light of the competitive "megatrends of wireless substitution for wireline minutes" that "effectively transfers huge shareholder wealth to consumers" would be to turn that determination on its head.¹⁷⁶

In the face of demonstrated robust competition and overwhelming industry success, it is extremely difficult, if not impossible, to conclude that wireless carriers are impaired without UNEs. However, despite the impressive growth statistics published by the CTIA, wireless carriers have begun to assert that certain UNEs are necessary for their continued success.¹⁷⁷ These carriers do not explain how an industry that adds more subscribers each year than BellSouth has in its entire region is impaired in its ability to provide the services it seeks to offer. It defies logic and market evidence to assert that a "full-fledged competitor" – as the wireless industry describes itself in relation to ILECs – cannot compete without access to ILEC UNEs.¹⁷⁸

¹⁷³ 2002 UNE Fact Report at II-37.

¹⁷⁴ See generally, *UNE Remand Order*, 15 FCC Rcd at 3734, ¶ 73.

¹⁷⁵ *Id.*

¹⁷⁶ Cleland, *Telecom's Debt Spiral*, Precursor Group (Feb. 5, 2002).

¹⁷⁷ See AT&T/VoiceStream Petition.

¹⁷⁸ *Id.* at 3.

No doubt because of this, when confronted with their own statistics, wireless carriers change their ringing tones and argue statutory “entitlement” rather than actual “impairment.” AT&T Wireless and VoiceStream Wireless now assert that as valid “requesting carriers” they are entitled to UNEs.¹⁷⁹ However, wireless carriers should not be able to avail themselves of UNEs merely because they arguably meet the definition of a “requesting carrier” – this would make a sham of any impairment analysis because it completely overlooks the widespread competition that has occurred without access to UNEs – in fact, it demonstrates and confirms that a pro-competitive, de-regulatory approach (especially compared to current Title II regulation) will actually encourage facilities-based competition, investment and innovation.

Recently, CLECs have sought to purchase new UNEs from BellSouth or convert special access circuits provided by BellSouth to UNEs in order to serve wireless carriers as their customers. In these cases it is appropriate to consider the particular types of customers that the carrier seeks to serve.¹⁸⁰ Because the ultimate end user of the service is either the wireless carrier or the wireless carrier’s wireless subscriber, UNEs should not be available under these circumstances. Just as the wireless carrier’s putative status as a “requesting carrier” is not enough, absent a finding of impairment, to entitle access to UNEs, neither is the requesting carrier’s status as a “CLEC” (that only serves wireless carriers) alone determinative. The Commission must determine if the wireless carrier served by the CLEC (the ultimate end user here) would be impaired in its ability to provide a particular service.¹⁸¹ In this case, the Commission must conduct a thorough evaluation of the alleged impairment by the wireless industry. Even a preliminary analysis of individual unbundled network elements demonstrates

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *UNE Remand Order*, 15 FCC Rcd at 3737, ¶ 81.

¹⁸¹ *Id.*

why it would not be appropriate for the Commission to require ILECs to unbundle its network to CLECs for the sole purpose of ultimately enabling a wireless carrier, through regulatory leverage, to amass greater profit margins in an already fully ubiquitous and price competitive service at the sole risk and expense of ILECs.

A. Loops, Subloops and Network Interface Devices (NIDs) Are Inapplicable to the Wireless Service Context.

The loop, subloop and NID were defined by the Commission as network elements subject to potential unbundling in order to enable requesting carriers to connect their end user customers to the carrier's equipment.¹⁸² Specifically, a loop is defined as a transmission facility between a distribution frame in an ILEC central office and the demarcation point at a customer premises.¹⁸³ A subloop is defined as any portion of the loop that another carrier can access at technically feasible points in the ILEC's outside plant.¹⁸⁴ A network interface device (NID) is defined as any means of interconnecting the end user customer premises wiring to the ILEC's distribution plant.¹⁸⁵ In each definition, an interconnection between the end user customer premises and the carrier's facility is contemplated.

In wireless service, the end user "roams" off of a cell site; thus, there is no fixed customer premises. The connection between the end-user subscriber and the wireless network is established through a wireless radio interface and, ipso facto, there is no application, let alone need or impairment, for a wireline landline loop. Some carriers have attempted to argue that the facility between a cell site and an ILEC end office is the functional equivalent of a loop. However, this argument requires the Commission to consider the cell site, rather than the

¹⁸² *NPRM*, ¶ 49.

¹⁸³ 47 CFR §51.319(a)(1).

¹⁸⁴ 47 CFR §51.319(a)(2).

¹⁸⁵ 47 CFR §51.319(b).

subscriber who roams off of the cell site via an air/radio interface, as the actual end user. While the Commission has not specifically defined “end-user” for UNE purposes in its regulations, its common sense use of the term in throughout the *UNE Remand* Order accords with the definition of “end user” that the Commission established long ago in the access arena¹⁸⁶ and that definition is still in effect today.¹⁸⁷ A cell site is simply not an “end-user.” A carrier cannot be considered an end user except when using telecommunications services for administrative services.

In addition to wireless carriers, certain CLECs have argued that they should be able to convert special access or other private line tariffed services to UNEs between cell sites and ILEC end offices or switches because the cell site is simply a customer.¹⁸⁸ This is wrong. The cell site is merely a component facility of the wireless carriers’ network. While wireless carrier may be considered the CLEC’s customer, a “carrier” cannot be considered an end user. A facility between a cell site and an ILEC end office or switch cannot be considered the functional equivalent of a loop because the cell site is merely one hardware component in the overall wireless network. Thus, this facility is, in reality, a point-to-point private line.

In the absence of a fixed customer premises, both subloops and NIDs are similarly inapplicable to the wireless paradigm. In the wireless arena, the “customer premises” is a subscriber’s car, purse, briefcase, belt-clip, coat pocket, backpack or other transient locations. There are no transmission facilities or premises wires connecting to these locations. For all of

¹⁸⁶ *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, CC Docket No. 86-1, *Report and Order*, 59 Rad. Reg. 2d (P&F) 1418 (1986).

¹⁸⁷ 47 C.F.R. §69.2(m) (“*End User* means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an “end user” when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller[.]”).

¹⁸⁸ CLECs are making similar specious arguments in the context of the conversion of broadband service for information service providers. 2002 UNE Fact Report at V.D.

these reasons, wireless providers or CLECs seeking to serve wireless carriers should not be entitled to unbundled loops (including subloop and NID) as the element does not exist in a wireless network.

B. Wireless Providers are Not Impaired Without Access To ILEC Interoffice Transmission Facilities.

Wireless carriers have recently argued that they are impaired without access to unbundled dedicated transport.¹⁸⁹ In addition to the established lack of impairment as detailed above, BellSouth and others have asserted that CMRS providers are not entitled to dedicated transport as a UNE for several reasons.¹⁹⁰ The wireless carriers' network configuration illustrates these arguments. First, facilities from cell sites to a mobile switching center or an ILEC end office cannot be considered "dedicated transport" under the Commission's current definition because these facilities are not between switches or wire centers.¹⁹¹ While the wireless carrier may argue that a base station (which, in fact, are not located on every cell site) performs some switching functions, their arguments that a wireless base station is the equivalent to an ILEC end office or performs the stand alone switching function of an end office are unsupportable.¹⁹² Ample evidence in the record of this proceeding refutes these arguments.¹⁹³

Even AT&T Wireless and VoiceStream Wireless concede in their Petition that a base station, unlike an ILEC central office, cannot function alone. "The base station itself cannot

¹⁸⁹ See AT&T/VoiceStream Petition.

¹⁹⁰ See BellSouth *ex partes* filed June 19, 2001, Aug. 22, 2001 and Oct. 10, 2001, and Verizon Communications *ex parte* filed August. 22, 2001 in CC Docket No. 96-98

¹⁹¹ 47 C.F.R. § 51.319(d)(1)(i).

¹⁹² Indeed, when evaluating wireless networks, the Commission decreed the Mobile Telephone Switching Office (MTSO), *not* a cell site or base station, as the equivalent of an ILEC end office switch. See *In the Matters of TSR Wireless, LLD, et al., Complainants, v. U.S. West Communications, Inc., et al., Defendants*, File Nos. E-98-13, *et al.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11179-80, ¶ 23 (2000).

¹⁹³ Supra n. 32.

perform all of the functions necessary to switch calls between cell sites.”¹⁹⁴ Thus, even when a base station is located at a cell site, the facility between the ILEC end office and the base station is merely a point-to-point private line. Wireless carriers try to overcome the base station’s fundamental lack of functional equivalency to an ILEC central office by bootstrapping its limited functions to a corresponding mobile switching office. These efforts are to no avail. Numerous elements within a carriers network operate in conjunction, thereby creating the “network.”¹⁹⁵ It is ludicrous to assume that the combination of functions can be used to meet the Commission’s very specific defined terms. ILECs simply have no need and therefore do not build DS1/DS3 level transport facilities to remote cell sites; they do so only pursuant to the specific request of wireless carriers under appropriate tariff arrangements.

Second, most wireless carriers have configured their networks based primarily on SONET ring technology. The carriers connect their facilities along a ring, and circuits extending off of the ring connect to cell sites.¹⁹⁶ The Commission has not required the ILECs to provide unbundled access to SONET rings.¹⁹⁷ Specifically, the Commission has not “require[ed] incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.”¹⁹⁸ While wireless carriers would have the Commission believe that the ILECs simply assign or piece together SONET rings with existing wireline facilities, this is not the case in fact.

¹⁹⁴ AT&T/VoiceStream Petition at 20.

¹⁹⁵ 2002 UNE Fact Report, Section at V-21 , Fig. 4 “CDMA Network Configuration” and accompanying text.

¹⁹⁶ *See BellSouth ex partes filed June 19, 2001 and Aug. 22, 2001 in CC Docket No. 96-98.*

¹⁹⁷ *UNE Remand Order*, 15 FCC Rcd at 3843, ¶ 324.

¹⁹⁸ *Id.* Here again the Commission specifically considers unbundling for “competitive LECs,” not wireless carriers. There is no discernable intent by the Commission, express or implied, that these unbundling obligations extend to wireless carriers.

While an ILEC may use some existing facilities, a SONET ring is not a ring until it is built to the wireless carrier's exact specifications. For example, the wireless carrier must work with the ILEC's systems designers to determine the locations of each and every node on a ring, the location of switches and the necessity for equipment such as multiplexers. None of these electronics are deployed until after a ring is specifically ordered and designed. BellSouth does not offer an "off the shelf" SONET ring product. Each ring is built pursuant to the wireless carrier's definitive request. Further, each ring is a dedicated ring designed to meet the wireless carrier's specific capacity requirements and is used for that individual wireless carrier. Therefore, it is a "custom" service offering. As such, it is not required to be unbundled.¹⁹⁹

In addition to the fact that these facilities are neither loops nor interoffice facilities, those circuits extending off of a tariffed SONET ring service and connecting to a base station or cell site should not be unbundled pursuant to the Commission's Safe Harbor Rules.²⁰⁰ AT&T Wireless and VoiceStream Wireless have argued that the Safe Harbor Rules do not apply in this instance because they were intended to prevent interexchange carriers from circumventing special access.²⁰¹ However, the Commission has upheld the application of the Safe Harbor Rules to CLECs.²⁰² Wireless carriers cannot be heard to argue that they should be treated as CLECs for the purpose of being granted access to ILEC UNEs, but should not be treated as CLECs for the purposes of the Safe Harbor rules. Inconsistent application of the Commission's rules will only lead to continued confusion in the industry.

¹⁹⁹ *Supra*, n. 206.

²⁰⁰ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("Supplemental Order Clarification").

²⁰¹ See AT&T/VoiceStream Petition at 10.

²⁰² See *Supplemental Order Clarification*, 15 FCC Rcd 9587.

Finally, the wireless carriers have asserted that there are no sufficient alternatives to ILEC tariffed interoffice transmission facilities.²⁰³ This is simply not the case. In the BellSouth region alone, there are multiple true facilities-based CLECs offering service. Further, BellSouth has provided the Commission evidence, including market penetration maps, demonstrating that there are numerous alternatives available to the wireless carriers.²⁰⁴ And as Economist Howard Shelanski explains, CMRS providers, like interexchange carriers, have had no difficulty obtaining special access from the ILECs through non-UNE arrangements.²⁰⁵ Thus the Commission should neither extend unbundling to cases where competitive facilities can and do exist, or where regulated or tariffed arrangements between ILECs and wireless carriers eliminate impairment.²⁰⁶

Not to be overlooked is the critical fact that experience shows self-provisioning to be a feasible and demonstrable alternative for wireless carriers. Historically wireless carriers constructed their network infrastructure with the use of microwave facilities. Due to the competitive offering provided by ILECs, wireless carriers have migrated from this approach to one that uses ILEC provisioned private line and special access circuits. This migration has been based on both availability and competitive pricing arrangements.

By their own estimate, wireless carriers are offering a substitute for local telephony services at prices that are competitive, or even better than competitive, with ILECs. The success of the wireless industry indicates that wireless carriers are not impaired in their ability to build out their own networks. The wireless industry is adding millions of subscribers each year.

²⁰³ See ATT/Voice Stream Petition at 7.

²⁰⁴ See BellSouth *ex parte* filed Aug. 22, 2001 in CC Docket No. 96-98.

²⁰⁵ Shelanski Decl., ¶ 52.

²⁰⁶ 2002 Fact Report at V-20.

Requiring the ILECs to offer unbundled network elements to wireless providers, directly or indirectly through CLEC affiliates, merely to enable those carriers to amass greater profits, is both inimical to section 251 and contrary to the Supreme Court's mandate.²⁰⁷

VII. SPECIFIC NETWORK ELEMENTS: LOOPS, SUBLOOPS & NIDS

In the *UNE Remand Order* the Commission found "[t]hat some competitive LECs, in certain instances, have found it economical to serve certain customers using their own loops," suggesting to the Commission "that carriers are unimpaired in their ability to serve those particular customers"²⁰⁸ and that "competitive LECs have successfully constructed loops in some circumstances."²⁰⁹ The Commission also determined, that the "gradual self-provisioning that such access encourages could lead, in time, to conditions that would permit the eventual elimination of the loop element from the unbundling obligations of the Act."²¹⁰

The Commission thus determined, in accord with the market evidence, that after the initial three years of access to unbundled loop elements (not including the subloop), CLECs were gradually beginning to self-provision their own loops, and were not impaired, in some markets, without access to ILEC loops. This finding alone should have ended the Commission's inquiry with respect to those types of loops in those particular markets.²¹¹ Nevertheless, the Commission refused to remove those loop elements that CLECs were successfully self-provisioning from the list of elements subject to unbundling in those areas in which the Commission conceded CLECs were not impaired. Contrary to the Supreme Court's admonition, and to the Commission's own

²⁰⁷ *Iowa Utils. Bd.*, 525 U.S. at 390; *UNE Remand Order*, 15 FCC Rcd at 3734, ¶ 73.

²⁰⁸ *UNE Remand Order*, 15 FCC Rcd at 3780, ¶ 184.

²⁰⁹ *Id.* at 3781, ¶ 186.

²¹⁰ *Id.* at 3793, ¶ 215 (discussing subloop unbundling).

²¹¹ The fact that CLECs are in some cases supplying their own facilities demonstrates that competitive provision of the element at issue economically feasible. That in itself weakens any argument for impairment. Shelanski Decl., ¶ 72.

that non-facilities based CLECs will remain at a permanent cost disadvantage with respect to facilities based carriers; and the CLECs financial viability will be dependent on the regulator's interest or commitment to keep less cost efficient resellers in business.³⁵⁸

CONCLUSION

The Commission should refrain from or limit further the unbundling of existing UNEs in accordance with these comments. The Commission should not allow the unbundling of new ILEC investments, or the unbundling of facilities used to provide advanced services, wireless services, interexchange services, exchange access services or information services. State commissions must not be at liberty to make any UNE determination in consistent with that taken by the FCC.

Respectfully submitted,

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³⁵⁸ It is not at all clear that these state efforts will result even in short term consumer benefits: "Given the recent favorable ruling on reduced UNE-P pricing in New York (and perhaps other states to follow), AT&T may reinstate efforts to offer consumer local service, but probably not much in 2002. The company lobbied heavily for the newly-ordered low UNE-P rates in New York and applauded the implementation of low rates in Michigan a year ago, but the company has yet to follow its regulatory policy with marketing in these and other relatively low rate UNE states." R. G. Klugman & R. Bienstock, *Telecom Services Group*, Jeffries & Company, Inc. (Jan. 31, 2002).